No. 75-1344

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. SCARBOROUGH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 539 F. 2d 331.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1976. On February 26, 1976, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 19, 1976. The petition was filed on March 17, 1976, and was granted on October 4, 1976.

QUESTION PRESENTED

Whether 18 U.S.C. App. 1202(a), which makes it unlawful for a convicted felon, among others, to receive, possess or transport a firearm "in commerce or affecting commerce," covers possession of a firearm which previously has been shipped or transported in interstate commerce.

STATUTES INVOLVED

18 U.S.C. App. 1201 provides:

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

18 U.S.C. App. 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. 1202(c) provides in pertinent part:

> As used in this title—
>
> (1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country; * * *.

18 U.S.C. 922(g) provides in pertinent part:

> It shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year * * * to ship or transport any firearm or ammunition in interstate or foreign commerce.

18 U.S.C. 922(h) provides in pertinent part:

> It shall be unlawful for any person—(1) who is under indictment for, or who has been convicted in any court of, a crime punishable

> by imprisonment for a term exceeding one year * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted, as a previously convicted felon, of possession in commerce or affecting commerce of four firearms, in violation of 18 U.S.C. App. 1202(a)(1) (App. 1).[1] He was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. 1a–6a; 539 F. 2d 331).

The evidence showed that in 1972 petitioner was convicted in a Virginia state court of possession of narcotics with intent to distribute, a felony (App. 2). In August 1973, law enforcement officials seized four firearms from petitioner's bedroom in Falls Church, Virginia, in the execution of a state warrant for a search of his residence for narcotics (App. 11–12).

Each of the four firearms—a .30 caliber Universal Arms Company Enforcer, a .38 caliber Colt revolver, a .30 caliber United States M–1 carbine, and a St. Etienne French Ordnance revolver—had been transported in interstate commerce prior to possession by petitioner. The Universal Arms Company Enforcer was manufactured in Florida and was shipped to Virginia, where it was sold to petitioner in 1970 (App. 7–8).[2] The Colt revolver was manufactured in Connecticut and had been shipped to a firearms dealer in North Carolina in 1969 (App. 6–7). The M–1 carbine had been shipped from an arsenal in Illinois to an individual in Maryland in 1966 (App. 8–9). The French revolver was manufactured in France during the nineteenth century (App. 9–10).

[1] The district court acquitted petitioner on another portion of the indictment charging him with receipt of the firearms, on the ground that the government had not established that the receipt occurred after the felony conviction (App. 12).

The court gave the following instruction on the relationship between possession and commerce (App. 14):[3]

> The government may meet its burden of proving a connection between commerce and the possession of a firearm by a convicted felon if it is demonstrated that the firearm possessed by a convicted felon had previously traveled in interstate commerce.
>
> * * * * *

[2] The evidence showed also that petitioner had ordered a replacement stock for the Universal Enforcer in 1973, one year after his conviction for a felony, and that the stock was subsequently shipped in interstate commerce from Florida to Virginia (Trial Transcript of reporter Webb, pp. 125–128, 137). A stock, in itself, is not a firearm as defined in 18 U.S.C. App. 1202(c)(3).

[3] The trial court refused to give petitioner's proposed instruction, which provided in pertinent part (App. 12–13): "In order for the defendant to be found guilty of the crime with which he is charged, it is incumbent upon the Government to demonstrate a nexus between the 'possession' of the firearms and interstate commerce. For example, a person 'possesses' in commerce or affecting commerce if at the time of the offense the firearms were moving interstate or on an interstate facility, or if the 'possession' affected commerce. It is not enough that the Government merely show that the firearms at some time had traveled in interstate commerce."

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> It is not necessary that the government prove that the defendant purchased the gun in some state other than that where he was found with it or that he carried it across the state line, nor must the government prove who did purchase the gun.

The court of appeals affirmed, ruling that "the Congressional purpose as expressed in the statute itself was that it was only necessary to establish that the firearm had previously traveled in interstate commerce to make out the offense whether of possession or of receipt and that [*United States* v. *Bass*, 404 U.S. 336] did not hold otherwise" (Pet. App. 4a; 539 F. 2d at 333). Noting that both "receives" and "possesses" in Section 1202(a) are modified by the same phrase, "in commerce or affecting commerce," the court held that the statute should not be construed to require proof of a greater interstate commerce nexus for possession than for receipt.

The court considered and expressly declined to follow *United States* v. *Bell*, 524 F. 2d 202, 205, in which the Second Circuit ruled that, while the receipt offense requires only that the firearm had previously traveled in commerce, the possession offense requires possession contemporaneous with interstate movement.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner contends (Br. 7) that the offense of possession of firearms under 18 U.S.C. App. 1202(a)(1) extends only to possession that has a "contemporaneous" nexus with interstate commerce, and does

not cover possession of firearms that have merely previously moved in commerce. Petitioner concedes (Br. 6–7) that the offense of receiving a firearm under Section 1202(a)(1) covers a firearm that previously moved in interstate commerce.

Petitioner's construction of the possession offense under Section 1202(a)(1) would exempt from the scope of federal gun control legislation broad categories of individuals and conduct that Congress intended to cover when it enacted that section. Petitioner's construction would permit convicted felons who received firearms before their felony convictions or before the enactment of the statute legally to retain possession of those weapons. As a practical matter, petitioner's construction would also permit convicted felons to retain possession of firearms received after their felony convictions or the enactment of the statute when the time or place the felon received the firearm is not susceptible to proof—for example, when the firearms were obtained surreptitiously. Petitioner's construction, therefore, would create a significant loophole in the statutory scheme, whose principal objective was to keep firearms out of the hands of convicted felons and other dangerous and irresponsible persons.

A. 1. The language of Section 1202(a)(1) shows that convicted felons and certain other dangerous and irresponsible persons are prohibited from both receiving and possessing any firearm that had previously travelled in interstate commerce. Congress' use of the phrase "in commerce or affecting commerce" mani-

fests a legislative intent to prohibit far more than receiving or possession of firearms contemporaneously with interstate movement. It reflects an intent broadly to prohibit the receiving and possession of firearms that have had any significant nexus with interstate commerce, including firearms that have previously moved in commerce.

Neither the language of the statute nor any rational legislative purpose supports petitioner's distinction between the interstate commerce nexus necessary to establish the receiving offense and the nexus necessary to establish the possession offense. The nature of the receiving and the possession offenses demonstrates that both may be established by proof that the firearms which are received or possessed have moved in interstate commerce.

2. The entire scheme of the federal gun control legislation confirms that Section 1202(a)(1) prohibits convicted felons from possessing firearms that have previously moved in interstate commerce. Virtually every provision of the statute is designed to keep firearms out of the hands of felons and other dangerous individuals. To construe Section 1202(a)(1) so as to permit felons to retain possession of firearms in certain common circumstances would create a gap in the statute and would undermine its central purpose. Furthermore, petitioner's construction of Section 1202(a)(1) would make that section largely superfluous, in view of 18 U.S.C. 922(g), which already prohibits convicted felons from transporting firearms "in interstate or foreign commerce."

B. The legislative history of Section 1202(a)(1) shows that Congress intended to prohibit as broadly as possible the possession of firearms by convicted felons without regard to whether the possession was in the course of interstate movement of the firearm. There is no indication in that history that the possession offense was to be restricted as petitioner urges.

C. This Court's opinion in *United States* v. *Bass*, 404 U.S. 336, does not establish that the possession offense under Section 1202(a) requires proof of possession contemporaneous with movement of the firearm in interstate commerce. The degree of proof of an interstate nexus for both the receiving and possession offenses was not an issue before the Court in *Bass*, and dicta in the Court's opinion which touched tangentially on that issue should not foreclose full consideration of the question in this case.

ARGUMENT

18 U.S.C. APP. 1202(a)(1) PROHIBITS A CONVICTED FELON FROM POSSESSION OF FIREARMS THAT HAVE PREVIOUSLY BEEN TRANSPORTED IN INTERSTATE COMMERCE

A. THE LANGUAGE AND STATUTORY SCHEME DEMONSTRATE THAT SECTION 1202(a)(1) PROHIBITS POSSESSION OF ANY FIREARM THAT HAS MOVED IN COMMERCE

1. The statutory phrase "affecting commerce" covers firearms that have moved in commerce

Section 1202(a)(1) provides criminal penalties for any convicted felon

> who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm * * *.

There can be no doubt about the power of Congress under the Commerce Clause to prohibit felons from possessing firearms that have moved in commerce. Cf. *United States* v. *Sullivan*, 332 U.S. 689, 698 (Congress has power "under the commerce clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce"). The power to regulate commerce "extends to those activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate means to the attainment of a legitimate end, and the effective execution of the granted power to regulate interstate commerce" (*United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119); cf. *Barrett* v. *United States*, 423 U.S. 212; *Fry* v. *United States*, 421 U.S. 542, 547. Indeed, in its findings at the beginning of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which includes Section 1202(a)(1), Congress expressly stated (18 U.S.C. App. 1201) that "the receipt, possession, or transportation of a firearm by felons * * * constitutes—(1) a burden on commerce or threat affecting the free flow of commerce * * *."

The only issue in this case, therefore, is whether Congress in fact exercised its broad power over commerce to prohibit the possession of firearms that have moved in commerce when it prohibited possession "affecting" commerce.

The term "affecting commerce" is a comprehensive concept reflecting the exercise by Congress of the full

extent of its power to regulate commerce. Cf. *United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 280:

> Congress * * * repeatedly acknowledged its recognition of the distinction between legislation limited to activities "in commerce," and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.

See, also, *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226.

Congress' understanding of the broad reach of the term "affecting commerce" is reflected in numerous statutes employing that term. Thus, for example, in 42 U.S.C. 2000a(c), Congress defined "operations affecting commerce" to include establishments, a substantial proportion of whose product *"has moved in commerce"* (emphasis supplied). See *Katzenbach* v. *McClung*, 379 U.S. 294, 302. Similarly, 18 U.S.C. 1951, which punishes "[w]hoever in any way or degree * * * affects commerce * * * by robbery or extortion * * *" reaches conduct related to the intrastate distribution of products that have come to rest in a state after their interstate movement. *United States* v. *Pacente*, 503 F. 2d 543, 550 (C.A. 7), certiorari denied, 419 U.S. 1048; *United States* v. *Gill*, 490 F. 2d 233, 236–237 (C.A. 7), certiorari denied, 417 U.S. 968. See, also, *e.g.*, 7 U.S.C. 2132(d), 2134, 2141 and 2142; 18 U.S.C. 245(b)(3); 29 U.SC. 141, 142, 152(7), 158(b)(4), 160(a), 185, 186, 187, and 504(a)(2); 30 U.S.C. 803.

Unlike the phrase "affecting commerce," the words "in commerce" have a narrower reach: they ordinarily cover only those activities that are actually within the flow of commerce or directly connected with it. See, *e.g., Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186; *United States* v. *American Building Maintenance Industries, supra.*[4]

Since Congress made Section 1202(a) applicable to conduct that is either "in commerce or affecting commerce," it intended to cover possession that affected commerce because the firearm had moved in commerce. The use of the disjunctive "or" shows that Congress did not limit the reach of the statute to possession that is "in commerce," as petitioner's interpretation of the statute would do. Indeed, petitioner's theory in practical effect would read the words "affecting commerce" out of the statute and would nullify the effect of the express finding made in Section 1201 that possession of firearms by convicted felons constitutes a "threat affecting the free flow of commerce."

The phrase "in commerce or affecting commerce" modifies not only "transports," but also "receives" and "possesses." *United States* v. *Bass,* 404 U.S. 336. The Court concluded in *Bass* that the government shows a sufficient nexus with commerce under the

[4] Examples of its use in criminal statutes are found in 18 U.S.C. 922(k) (transporting "in interstate or foreign commerce" firearms whose serial numbers have been removed); 18 U.S.C. 2421 (transporting women "in interstate or foreign commerce" for the purpose of prostitution; and 18 U.S.C. 1231 (transporting strikebreakers "in interstate or foreign commerce").

"receiv[ing]" offense "if it demonstrates that the firearm received has previously traveled in interstate commerce" (404 U.S. at 350). As we show below (pp. 17–24), the congressional objective in Section 1202(a) was to bar felons and other dangerous persons from possessing firearms. In terms of that purpose, there is no reason why Congress would have wished to require proof of a greater nexus with commerce for the possession offense than for the receipt offense.

To the contrary, since prohibiting possession was the primary objective of the provision, Congress could not have intended to require the government to show a closer connection with commerce in possession than in receipt cases. In view of that primary objective, there is no reason why Congress would have intended to prohibit a convicted felon from initially receiving a firearm that had previously moved in commerce, but would have intended to prohibit possession of such a weapon only when that weapon is actually moving in commerce. In either situation, the offense is established by showing that the receipt or possession "affects" commerce in that the firearm moved in commerce prior to its receipt or possession.

Although petitioner asserts (Br. 17–21) that the receipt of a firearm has an inherently closer nexus to interstate commerce than possession, this generalization does not withstand analysis. The relative closeness of the nexus to the interstate movement of the receipt or possession of a firearm depends not upon the inherent nature of the acts of receiving or possessing

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but upon the particular circumstances. In most instances, possession follows immediately upon receipt, and both acts have the same nexus to the prior movement of the firearm in interstate commerce.

Furthermore, in some cases a felon may receive a firearm in his own state that came to rest in that state months or years before he received it. Although petitioner agrees that such a receipt would be punishable under the statute, the act of receiving has no greater nexus to interstate commerce than the act of possessing the firearm. Thus, even in those cases where the government is able to prove when and where a felon received his firearm and thus to show that he received it after his felony conviction or after the enactment of the statute, that proof may not show any greater nexus between the receipt and interstate commerce than appeared from his possession alone.[5]

Petitioner argues (Br. 13), however, that if possession requires proof only that the firearm previously moved in commerce, the offenses of possession and receipt under Section 1202(a)(1) would merge, in violation of the principle that statutes should be construed to preserve their integrity. Under our construction, however, the offenses of receipt and possession under Section 1202(a)(1), while overlapping, are not coextensive. A person may possess a firearm in violation of the statute without having received it illegally—for example, where the receipt predated the enactment of the Act or the felony conviction, or where the firearm had not yet moved in interstate commerce at the time of its receipt.

[5] Petitioner suggests that prohibiting a convicted felon from retaining possession of a firearm acquired before his conviction might lead to the inequitable result that a person would become guilty of possession in violation of Section 1202(a)(1) at the instant he is convicted of a felony, even though he may not be able to dispossess himself of the weapon (Pet. Br. 15). Since possession involves some element of control (see, *e.g.*, *United States* v. *Bonham*, 477 F. 2d 1137 (C.A. 3); *United States* v. *Holland*, 445 F. 2d 701 (C.A.D.C.)), petitioner's hypothetical is without basis. To the extent that a recently convicted felon exercises only that degree of control necessary to relinquish possession in an otherwise legal manner, we submit that his conduct would not constitute an offense under Section 1202(a)(1).

It was primarily for this reason that Section 1202(a)(1) added possession to the offenses proscribed elsewhere in the statute. Under 18 U.S.C. 922(h), a convicted felon who had received a firearm prior to the enactment of the statute or his felony conviction could legally retain possession thereafter. The legislative history shows that an object of Section 1202(a)(1) was to ensure that convicted felons could not retain possession of firearms acquired previously (see discussion, *infra*, pp. 17–24).

Indeed, under petitioner's theory that the offense of possession under Section 1202(a)(1) requires that the possession be contemporaneous with the interstate movement, there would be little difference between the offenses of possession and transportation, since the proof necessary to show transportation would usually also establish possession.

Petitioner further argues (Br. 7–9) that a congressional intent to restrict Section 1202(a)(1) to conduct that has a contemporaneous connection with interstate commerce is shown by the use of the present

tense in the phrase "receives, possesses, or transports in commerce or affecting commerce." But the Court in *Bass* recognized that the receipt of a firearm that previously had moved in interstate commerce violates the section, even though that offense is described in the present tense. 404 U.S. at 350. The act of receiving or possessing a firearm "affect[s]" commerce if the firearm previously moved in commerce, and the tense of the operative verbs defining the offense sheds no light on what kind of nexus the statute requires.

2. The statutory scheme shows that Congress intended in Section 1202(a)(1) to prohibit felons from possessing firearms that have moved in commerce

Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, which includes Section 1202 (a)(1), must be construed in conjunction with the gun-control legislation contained in Title IV of that Act, which it was intended to "complement" (114 Cong. Rec. 16286 (1968); see also *id.* at 14774; cf. *United States* v. *Bass*, 404 U.S. 336, 342).[6] Title IV makes it unlawful for convicted felons "to ship or transport any firearm or ammunition in interstate or foreign commerce" (18 U.S.C. 922(g)), and "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" (18 U.S.C. 922(h)).

[6] The provisions of Title IV of the Omnibus Crime Control and Safe Streets Act were reenacted without relevant change in the Gun Control Act of 1968, 82 Stat. 1214. For convenience, those provisions are referred to collectively here as Title IV.

Under petitioner's interpretation of Section 1202 (a)(1), the possession offense under that section would have no broader scope than the crimes of receipt and transportation of firearms "in commerce" under Title IV. As set forth below (pp. 19–24), the legislative history shows that the purpose of Section 1202(a)(1) was to insure "that anybody who has been convicted of a felony * * * is not permitted to possess a firearm * * *. * * * [Section 1202(a)(1)] simply strikes at the possession of firearms by the wrong kind of people" (114 Cong. Rec. 13868–13869 (1968)). The intent of Congress in Section 1202(a)(1) to ban the possession of firearms by convicted felons and other persons who cannot be trusted with those weapons would be frustrated if the possession offense in that section is not broader in scope than the receipt and transportation "in commerce" offense in Title IV.

In addition to the prohibitions upon the receipt and transportation of firearms in commerce by convicted felons and other dangerous persons, Title IV regulates and prohibits a broad range of activities involving firearms, including the licensing of dealers in firearms (18 U.S.C. 923), recordkeeping and notification requirements relating to the sale or disposition of firearms (18 U.S.C. 922(e)), prohibition of the sale or disposition of firearms to felons and other potentially dangerous individuals (18 U.S.C. 922(d)), and prohibition of the common carriage in interstate commerce of firearms in violation of the statute (18 U.S.C. 922(f)). Virtually every provision in the entire statutory scheme evinces a legislative plan to

prohibit certain classes of dangerous persons from possessing firearms. As this Court stated in *Barrett* v. *United States*, 423 U.S. 212, 218, 220:

> The very structure of the Gun Control Act demonstrates that Congress did not intend merely to restrict interstate sales, but sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous.* * *
>
> * * * * *
>
> * * * Its broadly stated principal purpose was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968).

Petitioner's theory that Title VII protects only possession of firearms moving in commerce would create serious loopholes in the congressional plan to control firearms by prohibiting felons and other dangerous individuals from possessing them. For example, under petitioner's theory the statute would not reach individuals whose possession of firearms began before the statute was enacted or before their convictions.[7] It also would bar prosecution of many felons who acquire their firearms surreptitiously (such as from illegal sources or by theft), since as a practical matter the government frequently would be unable to show

[7] Such individuals would not be guilty of receipt under Section 1202(a)(1) by the terms of that section and would not be guilty of possession under petitioner's construction because the possession would not be "contemporaneous" with the movement of the firearms in commerce.

the time when or the place where possession was acquired.[8] In all those situations, however, the evil at which the legislation was directed—the possession of firearms by dangerous persons—is no less present than in cases where the possession is contemporaneous with the firearm's movement in commerce. In endeavoring to write an effective gun-control law, Congress did not intend to leave such a serious loophole.

As this Court said in *Barrett* v. *United States, supra,* 423 U.S. at 219, in rejecting a construction which would have created a similar gap in Title IV:

> Congress surely did not intend to except from the direct prohibitions of the statute the very act it went to such pains to prevent indirectly, through complex provisions, in the other sections of the Act.

B. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS INTENDED TO PROHIBIT THE POSSESSION BY FELONS OF FIREARMS THAT HAVE MOVED IN COMMERCE

The legislative history of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 confirms that Congress intended to supplement the gun-control provisions of Title IV of the Act by broadly pro-

[8] Such individuals would not be guilty of possession under petitioner's construction because the possession would not be contemporaneous with interstate commerce. They could not be convicted of receipt without proof that the receipt occurred after the felony conviction and after the enactment of the Act and without proof that the receipt occurred in the district where the prosecution takes place. In some circumstances, the facts concerning possession may support an inference with respect to time and place of receipt (see, *e.g.*, *United States* v. *Haley*, 500 F. 2d 303 (C.A. 8), but in many cases such an inference may not be possible.

scribing the possession of firearms by convicted felons. It shows that Congress used the words "affecting commerce" broadly, that it did not limit the coverage of the possession offense in Title VII to firearms that were being transported in commerce, and that it did not differentiate between the scope of the possession and receipt offenses of 18 U.S.C. App. 1202 (a)(1).

Title VII was introduced by Senator Long on the floor of the Senate on May 17, 1968, and was agreed to by the Senate by a voice vote on May 23, without having been referred to any committee.[9] 114 Cong. Rec. 14775 (1968). Accordingly, there were no legislative hearings and no committee reports on the statute. The legislative history of Title VII consists primarily of an explanation of the statute by its sponsor, Senator Long.[10]

Senator Long stated explicitly several times that the purpose of the proposed legislation was broadly to prohibit convicted felons and other potentially dangerous or irresponsible persons from possession of

[9] Title VII was introduced as an amendment to S. 917. 114 Cong. Rec. 13867 (1968). After the amendment passed, the Senate voted to amend H.R. 5037, a crime bill previously enacted by the House of Representatives, by deleting the House language and substituting the text of S. 917. 114 Cong. Rec. 14798 (1968). As amended, H.R. 5037 was returned to the House and approved on June 6, 1968, without further committee study. 114 Cong. Rec. 16300 (1968). The legislation, entitled the Omnibus Crime Control and Safe Streets Act of 1968, was signed into law by the President on June 19, 1968.

[10] The entire legislative history of Title VII is set forth as an appendix to the opinion in *Stevens* v. *United States*, 440 F. 2d 144, 152–166 (C.A. 6).

firearms.[11] In introducing his amendment, he commented (114 Cong. Rec. 13868–13869 (1968)):

> I have prepared an amendment which I will offer at an appropriate time, simply setting forth the fact that anybody who has been convicted of a felony * * * is not permitted to possess a firearm * * *.
>
> It might be well to analyze, for a moment, the logic involved. When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them.
>
> * * * * *
>
> [A] bill such as this could have prevented the assassination of President Kennedy by Lee Oswald. * * * For reasons involved in this bill, he would not have been permitted to possess firearms. And if he had managed to come into the possession of firearms illegally, most likely he would not have been such a good shot, because he would not have been able to practice the use of firearms, because people would have been aware that he had no right to possess or transport them.
>
> * * * * *

[11] The legislative history does not support petitioner's contention (Pet. Br. 12) that Senator Long and Congress focused on "the prevention of the *acquisition* of weapons by convicted felons * * *" (emphasis supplied). The primary concern with possession is reflected in virtually every sentence in the legislative history.

> It seems to me that this simply strikes at the possession of firearms by the wrong kind of people. It avoids the problem of imposing on an honest hardware store owner the burden of keeping a lot of records and trying to keep up with the ultimate disposition of weapons sold. It places the burden and the punishment on the kind of people who have no business possessing firearms in the event they come into possession of them.

That the legislation was not intended to be limited to the mere regulation of the possession of firearms that were moving in interstate commerce is shown by Senator Long's reliance, in supporting the constitutionality of Title VII, on this Court's decisions recognizing the broad reach of the Civil Rights Act of 1964 (see *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, and *Katzenbach* v. *McClung, supra*) (114 Cong. Rec. 13868 (1968)):

> For example, there was much debate and discussion about the constitutionality of the Civil Rights Act of 1964, but many of the items and transactions reached by the broad swath of the Civil Rights Act of 1964 were reached by virtue of the power of Congress to regulate matters affecting commerce, not just to regulate interstate commerce itself. * * * So if you want to do something about this matter, the present state of the law, as interpreted by the Supreme Court, would clearly permit you to reach either the possession or the transportation of weapons, in that this could affect commerce.

In a colloquy with Senator McClellan, Senator Long again made it clear that Title VII applied to possessions of firearms not moving in interstate commerce at the time of the possession (114 Cong. Rec. 14744 (1968)):

> Mr. McClellan. I have not had an opportunity to study the amendment. * * * The thought that occurred to me, as the Senator explained it, is that if a man had been in the penitentiary, had been a felon, and had been pardoned, without any condition in his pardon to which the able Senator referred, granting him the right to bear arms, could that man own a shotgun for purposes of hunting.
>
> Mr. Long of Louisiana. No, he could not. He could own it, but he could not possess it.
>
> Mr. McClellan. I beg the Senator's pardon?
>
> Mr. Long of Louisiana. This amendment does not seek to do anything about who owns a firearm. He could not carry it around; he could not have it.
>
> Mr. McClellan. Could he have it in his home?
>
> Mr. Long of Louisiana. No, he could not.

Prior to the Senate's passage of the Act, Senator Long summed up the purpose of Title VII (114 Cong. Rec. 14773–14775 (1968)):

> What the amendment seeks to do is to make it unlawful for a firearm * * * to be in the possession of a convicted felon * * *.
>
> * * * * *
>
> This amendment would proceed on the theory that every burglar, thief, assassin, and murderer is entitled to carry a gun until the com-

> mission of his first felony; but, having done that, he is then subject to being denied the right to use those weapons again.

These views were echoed in more general terms in the House by Congressman Machen (114 Cong. Rec. 16286 (1968)) [12]:

> Title VII prohibits the unlawful possession or receipt of firearms by felons, veterans who have been other than honorably discharged, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship. I believe this provision is necessary to a coordinated attack on crime and also a good complement to the gun-control legislation contained in title IV of this bill.

Finally, there is no indication in the legislative history that Congress in Title VII intended to proscribe only possession by felons of firearms where the possession was part of the interstate movement.

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[12] Congressman Pollock's remarks further support the construction that we urge. He said (114 Cong. Rec. 16298 (1968)): "This section makes it a Federal crime to take, possess, or receive a firearm across State lines when the person involved: First, has been convicted of a crime punishable by imprisonment for a term exceeding 1 year; * * *. The overall thrust is to prohibit possession of firearms by criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner. I agree with this provision and feel this title alone provides the gun legislation portion necessary under this bill, without need for enactment of title IV." This statement that the "overall thrust is to prohibit possession," coupled with the statement that the statute makes it a crime to possess or receive a firearm across state lines, fairly may be read to proscribe possession by a felon of a firearm that has crossed state lines in the past. It draws no distinction between receipt and possession with respect to the necessary nexus with commerce.

C. *UNITED STATES* v. *BASS*, 404 U.S. 336, DOES NOT PRECLUDE CONSTRUING SECTION 1202(a)(1) AS COVERING POSSESSION OF A FIREARM THAT HAS MOVED IN COMMERCE

In *United States* v. *Bass*, 404 U.S. 336, the defendant was convicted of possessing firearms in violation of Section 1202(a)(1). The proof showed only that the defendant was a convicted felon who possessed firearms; "[t]here was no allegation in the indictment and no attempt by the prosecution to show that either firearm had been possessed 'in commerce or affecting commerce.'" 404 U.S. at 338. This Court held that the words "in commerce or affecting commerce" modified not only "transports" but also "receives" and "possesses," and that Bass's conviction could not stand "because the Government has failed to show the requisite nexus with interstate commerce" (404 U.S. at 347). The Court then made the following statement (404 U.S. at 350, footnote omitted):

> Having concluded that the commerce requirement in § 1202(a) must be read as part of the "possesses" and "receives" offenses, we add a final word about the nexus with interstate commerce that must be shown in individual cases. The Government can obviously meet its burden in a variety of ways. We note only some of these. For example, a person "possesses * * * in commerce or affecting commerce" if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of "receiv[ing] * * * in commerce or affecting commerce," for we conclude that the Government meets its burden here if it demonstrates

that the firearm received has previously traveled in interstate commerce.

Petitioner interprets this statement as establishing that the prior movement of a firearm in commerce is not sufficient to establish the offense of possession under Section 1202(a)(1).[13] The statement, however, does not sustain the gloss petitioner would place upon

[13] Since *Bass*, the courts of appeals have divided over the quantum of interstate connection required in a prosecution for possession under Section 1202(a). In addition to the court of appeals in this case, the Sixth Circuit and the Tenth Circuit have concluded that proof of previous interstate movement of the firearm provides a sufficient commerce nexus. *United States* v. *Jones*, 533 F. 2d 1387 (C.A. 6); *United States* v. *Bumphus*, 508 F. 2d 1405 (C.A. 10) (dictum); *United States* v. *Bush*, 500 F. 2d 19 (C.A. 6); *United States* v. *Mullins*, 476 F. 2d 664 (C.A. 4); *United States* v. *Brown*, 472 F. 2d 1181 (C.A. 6). Conversely, three other circuits have indicated that while a demonstration that the firearm has previously traveled in interstate commerce will suffice for the receipt offense in Section 1202(a), the possession offense requires proof that the possession was in fact contemporaneous with an interstate movement. *United States* v. *Ressler*, 536 F. 2d 208 (C.A. 7); *United States* v. *Bell*, 524 F. 2d 202 (C.A. 2); *United States* v. *Steeves*, 525 F. 2d 33 (C.A. 8) (dictum); *United States* v. *Kelly*, 519 F. 2d 251 (C.A. 8) (dictum). An apparent intra-circuit conflict exists within the Ninth Circuit on the issue. Compare *United States* v. *Burns*, 529 F. 2d 114 (C.A. 9), with *United States* v. *Malone*, 538 F. 2d 250 (C.A. 9), and *United States* v. *Cassity*, 509 F. 2d 682 (C.A. 9).

Even the courts that have adopted petitioner's construction of Section 1202(a) have permitted the jury to draw broad inferences of receipt from the fact of possession. For example, in *United States* v. *Lathan*, 531 F.2d 955 (C.A. 9), the court upheld a conviction for receipt solely on the basis of evidence that the firearm had been manufactured outside of California, transported to California in 1962 and found in 1974 in the possession of a defendant who had been convicted in 1971. See, also, *United States* v. *Giannoni*, 472 F.2d 136 (C.A. 9), certiorari denied, 411 U.S. 935.

it, and it cannot fairly be read as disposing of this case. As the court of appeals noted here (Pet. App. 4a; 539 F. 2d at 333):

> [T]he Court in *Bass* was not * * * fixing precise criteria for establishing the degree of proof of interstate commerce movement required under the statute for the offenses of *receipt* and *possession*. This is plain from the language of the Court to the effect that "[t]he Government can obviously meet its burden [of proving a commerce nexus] in a variety of ways" under the statute and observed that it was noting "only some of these."

The Court's statement in *Bass* that the offense of receiving a firearm "in commerce or affecting commerce" could be established by showing that the firearm had previously traveled in interstate commerce does not preclude the conclusion that the offense of possessing a firearm "in commerce or affecting commerce" can be established by the same showing. Indeed, the Court recognized that the government could meet its burden of proof of an interstate nexus "in a variety of ways," one of which was that "the possession affects commerce"—a statement which the Court did not further define. To the extent that the Court's observations in *Bass* suggest that the offense of possession requires something more than proof that the firearm previously traveled in interstate commerce, that dictum should not control the present case, where "the very point [merely touched on in *Bass*] is presented for decision" (*Cohens* v. *Virginia*, 6 Wheat. 264, 399).

In *Barrett* v. *United States*, 423 U.S. 212, the Court refused to follow dicta in *Bass* (404 U.S. at 342–343) suggesting that Title IV of the Act does not cover intrastate transactions. In rejecting those dicta and holding the Act applicable to the intrastate transfer of firearms that was unrelated to their prior interstate movement, the Court pointed out (423 U.S. at 222–223) that the question was not before the Court in *Bass* and that the issue of the reach of Title IV was now "at hand with the benefit of full briefing and an awareness of the plain language of § 922(h), of the statute's position in the structure of the entire Act, and of the legislative aims and purpose." Similarly, the question of the nexus with interstate commerce necessary for the offense of possession under Section 1202(a) is before the Court, and should not be foreclosed by general statements in a case where the issue was not presented.

Petitioner further contends (Br. 15–24) that the considerations of federalism upon which *Bass* rested in part support his restrictive interpretation of the commerce requirement of Section 1202(a). *Bass* held only that in Section 1202 Congress had not manifested the intent "to effect a significant change in the sensitive relation between federal and state criminal jurisdiction" (404 U.S. at 349) that would result from construing the section as dispensing with proof of any interstate nexus at all. It pointed out (*id.* at 350, emphasis added) that "[a]bsent proof of *some* interstate commerce nexus in each case, § 1202(a) dramatically intrudes upon traditional state crime jurisdiction."

Nothing in *Bass*, however, suggests that the "federal-state balance" (*id.* at 349) would be impermissibly disrupted by holding that the necessary interstate nexus for the possession offense is established by proof that the firearm previously moved in interstate commerce. The Court indicated in *Bass* (*id.* at 350) that the government could prove the offense of receipt by demonstrating that "the firearm received has previously traveled in interstate commerce." The application of the same standard of proof to the possession offense would produce no greater upsetting of the traditional federal-state balance in criminal law than its application to the receipt offense sanctioned in *Bass*. Similarly, in *Barrett, supra*, the Court upheld the application of Title IV of the Act to a local firearm transaction that traditionally would be the subject of state criminal prosecution.

In view of the language of the statute and the purpose of Congress, there is no occasion here to apply the rule of lenity which petitioner invokes (Pet. Br. 12–13) to narrow the scope of the possession offense. Although penal laws are to be construed strictly, they "ought not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Co.* v. *United States*, 2 Pet. 358, 367; *United States* v. *Bass, supra*, 404 U.S. at 351; *Huddleston* v. *United States*, 415 U.S. 814, 831.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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